Supreme Court, U.S.
F I L E D
APR 27 1992
OFFICE OF THE CLERK

(2)

No. 91-1516

In the
Supreme Court of the United States

October Term, 1991

ANN G. STUART, et al
Petitioners,

v.

FRANCIS M. ROACHE, As He is
Police Commissioner of the City of Boston, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF MASSACHUSETTS PERSONNEL ADMINISTRATOR

Scott Harshbarger
Attorney General
of Massachusetts

Douglas H. Wilkins*
William W. Porter
Assistant Attorneys General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200
Counsel for Respondent

*Counsel of Record

34 pp

QUESTION PRESENTED

Whether there was a "strong basis in evidence" of past discrimination, so as to justify race-conscious relief in a consent decree governing certain promotions in the Boston Police Department?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the Petition for Certiorari. This brief in opposition is submitted by the state respondent, the Massachusetts Personnel Administrator.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

DECISION BELOW 1

RELEVANT CONSTITUTIONAL PROVISION 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 10

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND IS CHALLENGED BY PETITIONERS ONLY TO RAISE QUESTIONS OF EVIDENCE UNIQUE TO THIS CASE. 11

II. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW RESPECTING CONSTRUCTION OF CONSENT DECREES. 18

III. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE RACE-CONSCIOUS RELIEF TO WHICH THE PETITIONERS OBJECT IS NO LONGER OPERATIVE UNDER THE CONSENT DECREE. 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), aff'd, 459 F.2d 725 (1st Cir. 1972) 5, 17

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) 10, 11, 12, 13, 16

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 20, 21, 26

General Pictures Co. v. General Electric Co., 304 U.S. 175 (1938) 14

Hazelwood School District v. United States, 433 U.S. 299 (1977) 15

Massachusetts Association of Afro-American Police, Inc., et al. v. Boston Police Department, et al., United States District Court, District of Massachusetts, No. 78-529-S 2, 3

McDaniel v. Barresi, 402 U.S. 39 (1971) 24

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 26

Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) passim

Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238 (1985) 8

United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) 24

United States v. Paradise, 480 U.S. 149 (1987) 12, 18

United Steel Workers of America v. Weber, 443 U.S. 193 (1979) 24

In re Woods, 143 U.S. 202 (1892) 10

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 12, 13, 15, 23, 24

Constitutional Provisions

Equal Protection Clause of the Fourteenth Amendment 2

Statutes

42 U.S.C. § 2000e et seq. 4

Rules of Court

Supreme Court Rule 10 26

Supreme Court Rule 15 1, 8

Regulations

29 C.F.R. § 1607.1 *et seq.* 5

Pursuant to Supreme Court Rule 15, the respondent Massachusetts Personnel Administrator submits this brief in opposition to the petition for writ of certiorari filed in this case.

DECISION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 951 F.2d 446 (1st Cir. 1991). See Appendix to Petition, pp. 1-47.[1/] The decision of the United States District Court for the District of Massachusetts was not reported. App. 48-73.

1/ References to the Appendix to the Petition for Writ of Certiorari will hereafter be designated "App. [page #]".

RELEVANT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the Constitution states that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners are white patrol officers in the respondent Boston Police Department (the "Department"). They contend that the Department has contravened their rights under, inter alia, the Equal Protection Clause of the Fourteenth Amendment by promoting officers to the rank of sergeant in accordance with a consent decree entered in Massachusetts Association of Afro-American Police, Inc., et al. v. Boston Police Department, et al., United

States District Court, District of Massachusetts, No. 78-529-S (hereafter the "Consent Decree" or the "Decree"). Record Appendix, pp. 33-36.[2/] Petitioners also contend that the respondent Massachusetts Personnel Administrator (the "Personnel Administrator") has acted contrary to their rights under the Equal Protection Clause by approving such promotions in the exercise of his authority under Massachusetts civil service law. R.A. 19-36.

The Consent Decree

In 1978, the Massachusetts Association of Afro-American Police, Inc. ("MAAP"), and two individual black

---

2/ References to the Record Appendix which was filed with the petitioners' brief in the Court of Appeals will hereafter be designated "R.A. [page #]".

Boston police officers filed an action in the United States District Court for the District of Massachusetts under, inter alia, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., seeking to redress alleged unlawful discrimination against black officers in the Boston Police Department with respect to promotions, job assignments and compensation. R.A. 155-193. This litigation was settled, without admissions of liability, by the entry of a Consent Decree, which was approved by the District Court on September 16, 1980. App. 74-110. The Consent Decree was signed by, among others, the Department and the Personnel Administrator.

The Consent Decree required that examinations used to select officers for

promotion to sergeant be validated in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 et seq.. The Consent Decree also required the Department to provide training to all persons taking such examinations. App. 80-82.

The Consent Decree also established goals and timetables for the promotion of qualified black officers to the rank of sergeant. App. 95-97.[3/] These goals were tied to the size of

---

3/ With respect to the need for promotional goals, the Consent Decree stated, among other things, that as of the date of its entry, although 4.5% of all Boston Police officers eligible to compete for promotion to sergeant were black, the Department had only one black sergeant, who accounted for .45% of all sergeants. App. 88-96. The Decree also cited findings of unintentional discrimination against minorities in entry level hiring made in a prior action, Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), aff'd, 459 F.2d 725 (1st Cir. 1972). App. 95.

the pool of black officers eligible to compete for promotion to sergeant. App. 97. The Consent Decree did not establish racial quotas, however, stating:

> [t]he parties agree that the obligation of the Department is to make a good faith effort to reach these goals and that these goals have been set in anticipation of having a sufficient number of black officers to be promoted from lists based on validated tests.

App. 95-96. The Consent Decree did not require the demotion or discharge of any officer, or reduce the benefits paid to any officer.

The Consent Decree was originally entered for a five year term. App. 85. It has been extended twice, in 1985 and 1990, because the Department had not attained the sergeants promotional goal. When the Decree was extended, this goal was adjusted upward due to an

increase in the number of black officers eligible to compete for promotion to sergeant. R.A. 142-150. The Consent Decree's final promotional goal was a 15.5% representation of blacks in the rank of sergeant, as compared to a 19.56% representation of blacks among all officers eligible to compete for promotion to sergeant. App. 35, 47.

Since the Court of Appeals' decision was issued on December 23, 1991, the Department has reached the promotional goal set forth in the Consent Decree. On April 10, 1992, the Department promoted eighty-five (85) officers to the rank of sergeant, fifteen (15) of whom are black. As a result of these promotions, and pursuant to an amendment to the Consent Decree approved by the District Court on December 3, 1991, the

Decree's affirmative action goals and timetables have expired. Consequently, the racial preferences to which petitioners object in this case are no longer provided for in the Consent Decree.[4/]

Proceedings below

Petitioners filed this action in October 1990, alleging that they were passed over by the Department for promotions to the rank of sergeant in favor of black officers with lower scores on the civil service police promotional examination. Petitioners

---

4/ The information set forth in this paragraph is not in the record of this case, but is included here as it bears directly upon the appropriateness of review of this case. See Supreme Court Rule 15.1. See also Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238, 240 (1985) (describing counsel's duty to inform the Court of developments which may conceivably affect the outcome of the litigation).

claimed that their rights under, inter alia, the Equal Protection Clause were thereby violated, and sought declaratory and injunctive relief. R.A. 11-39.

The Department did not dispute that it had "bypassed" petitioners in promoting certain black officers to sergeant. Rather, the Department maintained that its actions did not amount to impermissible discrimination and were in all respects lawful as in accordance with the Consent Decree in the MAAP case. The Personnel Administrator similarly defended his actions by reference to the Consent Decree. App. 55.

Motions for summary judgment were filed by all parties. The District Court held that the promotional process under the Consent Decree is

constitutionally valid under the strict scrutiny standard articulated by this Court in City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), and granted summary judgment for respondents. App. 55-73. The Court of Appeals for the First Circuit affirmed. 951 F.2d 446.

REASONS FOR DENYING THE WRIT

This petition does not present a question of "such gravity and general importance" as to warrant review by this Court. In re Woods, 143 U.S. 202, 206 (1892). Petitioners do not contend that the decision below conflicts with that of any other court of appeals. Rather, petitioners challenge only the lower court's assessment of the sufficiency of the evidence to establish the necessary

predicate for race-conscious judicial relief. In addition, because the racial preference to which petitioners object is no longer provided for in the Consent Decree, the issue litigated below is not of sufficient continuing importance to merit review by this Court.

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND IS CHALLENGED BY PETITIONERS ONLY TO RAISE QUESTIONS OF EVIDENCE UNIQUE TO THIS CASE.

In City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), a majority of the Court agreed for the first time that race-based preferences must be reviewed under a standard of strict scrutiny when challenged as violative of the Equal Protection Clause of the Fourteenth Amendment. Id. at 494 (plurality); id. at 519 (Kennedy, J., concurring in part

and concurring in the judgment). To meet this standard, race-conscious judicial relief must be justified by "a compelling interest", id. at 505, and be "narrowly tailored" to further that interest. Id. at 507-508. See United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality) (setting out two-part strict scrutiny test). Remedying identified past discrimination constitutes a compelling state interest and is therefore a sufficient predicate for ameliorative race-based preferences. Croson, 488 U.S. at 500-505; Paradise, 480 U.S. at 167 (plurality); Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986) (plurality). The foregoing principles were carefully applied by the Court of Appeals in reviewing the Department's

promotional process under the Consent Decree. 951 F.2d at 449-455. (App. 10-41). Petitioners do not urge that a different standard should have pertained.

The Court of Appeals determined that there must be a "strong basis in evidence" to justify the conclusion that race-conscious remedial action was necessary to remedy past discrimination. 951 F.2d at 449-450. (App. 13-14). See Croson, 488 U.S. at 500, quoting Wygant, 476 U.S. at 277 (plurality). In upholding the Consent Decree, the Court of Appeals found that the evidence before it met this test. 951 F.2d at 450-453. (App. 14-33). Petitioners do not object to this evidentiary standard; they simply argue that the particular mix and quantum of evidence before the District Court was

not "strong" enough. See e.g. Petition, pp. 10-11. Because petitioners ask this Court to review no more than the lower court's assessment of the evidence in the particular circumstances of this case, the petition should be denied. See General Pictures Co. v. General Electric Co., 304 U.S. 175, 178 (1938) ("Granting the writ would not be warranted merely to review the evidence or inferences drawn from it.")

In any event, petitioners' two fundamental complaints about the Court of Appeals' evaluation of the evidence are misplaced. Petitioners contend that the court below improperly considered statistics to which the Department stipulated in the Consent Decree showing the substantial disparity between the number of black officers eligible to

compete for promotion to sergeant, and the number of black sergeants.[5/] In Croson, however, the Court acknowledged "that '[w]here gross statistical disparities can be shown, they alone in a proper case may consititute prima facie proof of a pattern or practice of discrimination' under Title VII," 488 U.S. at 501, quoting Hazelwood School District v. United States, 433 U.S. 299,

---

5/ Although petitioners complain about the use of these statistics, they submitted no evidence to the District Court to dispute their accuracy. App. 32-33. See Wygant, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment) (Plaintiffs in "reverse discrmination" suits continue to bear the ultimate burden of persuading the court that a public employer's evidence does not support an inference of prior discrimination and thus a remedial purpose for race-conscious action.)

307-308 (1977).[6/] In Croson, this Court rejected the city's proffered statistics because they did not demonstrate discriminatory exclusion with reference to the "relevant statistical pool" (i.e. minority businesses qualified to undertake the particular construction work). 488 U.S. at 501-502. The court below, however, found that the Consent Decree makes an appropriate comparison under Croson, as it "compares the number of black sergeants, not with the Boston

---

6/ For example, with reference to minority membership in contractors' associations, the Court stated in Croson: "If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market." 488 U.S. at 503.

population in general, but with those police officers with the minimal qualifications needed to become sergeants." 951 F.2d at 451. App. 20.

Petitioners also object to the Court of Appeals' consideration of a related case, Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), aff'd, 459 F.2d 725 (1st Cir. 1972), which is referred to in the Consent Decree. In Castro, the Boston Police Department and the state Civil Service Commission were found to have engaged in unintentional discrimination against black and Spanish-surnamed applicants in hiring for entry level police positions. It was not improper for the Court of Appeals to consider this finding in assessing whether there was, in the MAAP case, a "strong basis in evidence" for

race-conscious relief respecting police promotions. Remedial action at the promotional level can be warranted where an employer has been found to have discriminated in entry level hiring. See U.S. v. Paradise, 480 U.S. at 168 (plurality) ("Discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by non-minorities.")

II. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW RESPECTING CONSTRUCTION OF CONSENT DECREES.

In their effort to present a question worthy of this Court's review, petitioners have mischaracterized the Court of Appeals' treatment of the Consent Decree entered in the MAAP case. Petitioners incorrectly contend that the Court of Appeals "modified" and

"reconstructed" the Consent Decree (Pet. 14, 17), and "re-litigated" the allegations of discrimination made in the MAAP case. (Pet. 10, 12). As is apparent from its decision, the Court of Appeals did none of these things.

In assessing whether there existed a "strong basis in evidence" for the District Court's conclusion that the race-conscious relief appearing in the Consent Decree was warranted, the Court of Appeals considered the factual material set forth by the parties in the Consent Decree to describe the circumstances surrounding the entry of the Decree. 951 F.2d at 450-453. (App. 15-29).[7/] In doing so, the Court of

---

7/ The Consent Decree was submitted to the District Court by the petitioners in support of their motion for summary judgment. App. 33; R.A. 42.

Appeals determined that the disclaimer of l bility in the Decree did not bar consideration of this information. 951 F.2d at 453. (App. 24-32). Contrary to petitioners' suggestion, the Court of Appeals did not "modify" the MAAP Consent Decree, or "relitigate" any issue in the MAAP case, when it construed the disclaimer provision for purposes of considering evidence in the present case.

As such, petitioners are wrong to contend that the decision below is inconsistent with Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). In Stotts, this Court held that the trial court could not, under the authority of a pre-existing consent

decree, issue an injunction which provided for equitable relief not authorized or envisioned in the consent decree, where certain parties to the decree objected to such relief. Id. at 572-583. In the present case, the District Court did not issue an injunction or any other order which enforced or modified the MAAP consent decree. Rather, both the District Court and the Court of Appeals simply considered certain factual material contained in the Consent Decree as part of their assessment of the petitioners' collateral attack on the Decree.

Petitioners complain that the Court of Appeals should have construed the disclaimer of liability provision in the Consent Decree differently, to preclude consideration of all such factual

material. In this regard, petitioners merely challenge the Court of Appeals' interpretation of a particular provision in this particular consent decree, without any showing that this issue applies to other cases. Petitioners also do not contend that a conflict exists among the courts of appeals in this regard.[8/]

In any event, the Court of Appeals was clearly correct in holding that the disclaimer of liability in the Consent Decree, under which the parties to the MAAP case settled the litigation without

---

8/ Indeed, on this issue the decision below expressly follows the consistent treatment which other courts of appeals and district courts have given disclaimers of liability in consent decrees. See cases cited at 951 F.2d at 453. (App. 31-32). The cases cited by the Court of Appeals are only "roughly comparable", id., in view of the uniqueness of each disclaimer provision and each consent decree.

the entry of judicial findings of fact, does not preclude consideration in collateral proceedings of facts to which the parties agreed in the Decree. In her concurring opinion in Wygant v. Jackson Board of Education, 476 U.S. at 289-290, Justice O'Connor addressed this issue as follows:

> I . . . agree with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan. . . . The imposition of [such a] requirement . . . would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.

Justice O'Connor further noted that this view is consistent with this Court's previous decisions "recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the

absence of a specific finding of past discrimination," citing e.g. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-166 (1977) (reapportionment) and McDaniel v. Barresi, 402 U.S. 39 (1971) (school desegregation). Id. at 291. Cf. United Steel Workers of America v. Weber, 443 U.S. 193 (1979) (approving voluntary affirmative action plan implemented by private employer to correct apparent violation of Title VII).

III. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE RACE-CONSCIOUS RELIEF TO WHICH THE PETITIONERS OBJECT IS NO LONGER OPERATIVE UNDER THE CONSENT DECREE.

On April 10, 1992, the Department promoted eighty-five officers to the rank of sergeant, including fifteen black officers. With these promotions, the Department has achieved the Decree's

goal of forty black sergeants. See App. 47. Pursuant to an amendment to the Consent Decree approved by the District Court on December 3, 1991, once the complement of black sergeants in the Department reaches forty, "the Decree's affirmative action goals and timetables thereupon will expire."[9/]

Because the race-based preference which petitioners challenge in this case is no longer operative, there is no continuing significance to the issues they raise. Neither the petitioners nor other non-minority Boston Police officers will in the future be impacted by the Consent Decree in the manner

---

9/ Pursuant to the same amendment, the remaining provisions of the Consent Decree, including, inter alia, those which concern validation of the sergeants promotional examination, continue in effect until a date certain following the next examination.

alleged by petitioners in this case. Thus, no "special and important" reason exists to grant the petition. Supreme Court Rule 10. See Rice v. Sioux City Cemetery, 349 U.S. 70, 73-80 (1955) (writ of certiorari dismissed as improvidently granted where subsequently enacted statute barred question from arising again, even though petitioner's individual claim was unaffected).[10/]

10/ The petitioners' claims in this case may not technically be moot, in that petitioners seek an injunction requiring that they be promoted to sergeant with their seniority and compensation determined retroactively to the dates upon which they were "passed over" as a result of the Consent Decree. Cf. Stotts, 467 U.S. at 571-572 (where employees who were laid off pursuant to injunction had been rehired, case challenging injunction not moot where claims for back pay and restoration of seniority remained). This Court need not, however, consider the potentially difficult question of mootness at the certiorari stage, as this case is otherwise unworthy of review for all the reasons discussed above.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

Douglas H. Wilkins
Counsel of Record
William W. Porter
Assistant Attorneys General
Government Bureau
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200

Dated: April 27, 1992